Office Supreme Court, U.S.
FILED
FEB 5 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 779.

CARL M. FIELD, as Trustee in Bankruptcy in the Estate of Giant Outlet Market, Inc., Bankrupt,

Petitioner,

v.

BANKERS TRUST COMPANY and THE FIRST NATIONAL CITY BANK OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR FIRST NATIONAL CITY BANK IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI.

JOHN A. WILSON,
J. ROBERT LUNNEY,
Attorneys for Respondent
First National City Bank
20 Exchange Place
New York 5, New York

SHEARMAN & STERLING,
Solicitors for Respondents

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	2
Argument	2
Conclusion	5

Citations.

Cases:

Cottrell v. *Albany Card & Paper Mfg. Co.*, 142 App. Div. 148 (3d Dept. 1911)	2
Cowin v. *Jonas, et al.*, 293 N. Y. 838 (1944)	4
Grace v. *Corn Exchange Bank*, 287 N. Y. 94 (1941)	4
Irving Trust Co. v. *Gunder*, 234 App. Div. 252 (1st Dept. 1932)	4
Reif v. *Equitable Life Assurance Society*, 268 N. Y. 269 (1935)	4

Statutes:

New York Stock Corporation Law, §58	2
New York Negotiable Instruments Law, §95	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 779.

CARL M. FIELD, as Trustee in Bankruptcy in the Estate of Giant Outlet Market, Inc., Bankrupt,

Petitioner,

v.

BANKERS TRUST COMPANY and THE FIRST NATIONAL CITY BANK OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR FIRST NATIONAL CITY BANK IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI.

Opinions Below.

The unanimous opinion of the Court of Appeals (Petitioner's Appendix, pp. 10-18) is reported at 296 F. 2d 169 (C. A. 2). The judgment of the Court of Appeals was entered on November 8, 1961. A petition for rehearing and a petition for rehearing *in banc* were both denied by the Court of Appeals on December 7, 1961. The district court's opinion is reported at 184 F. Supp. 23 (E. D. N. Y.).

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented.

When a payment is made out of corporate funds and is used to pay a corporate officer's personal debt to a bank, does not the fact that such payment was made with the authorization of the corporation and when the corporation was solvent, defeat any recovery from the bank by the trustee in bankruptcy of the corporation, even though such payment impaired the corporation's capital, but without the knowledge of the bank?

Statutes Involved.

The essential part of Section 58 of the New York Stock Corporation Law is set forth in the margin of the Court of Appeals opinion (Petitioner's appendix, p. 18).

Section 95 of the New York Negotiable Instruments Law is set forth in the brief of respondent Bankers Trust Company (p. 2).

Statement.

The statement of facts as set forth in the opinion of the Court of Appeals (Petitioner's appendix, pp. 10-18) is not controverted by the parties.

Argument.

Giant Outlet Market, Inc. (Giant) filed a corporate resolution with Bankers Trust Company (Bankers) which

authorized its president Martin Lew (Lew) to sign and endorse all negotiable instruments and authorized Bankers to pay them. This resolution permitted Bankers to pay checks drawn by Lew in payment of his personal obligations.

Paying Lew's personal debts out of Giant's account was not sufficient to put Bankers on inquiry as to Lew's authority or impute knowledge to Bankers of any infirmity or defect in such payments, once the resolution was filed. Section 95, New York Negotiable Instrument Law.

Lew owed $6,000 to First National City Bank (FNCB) for a personal loan (which had been used to finance Giant). On July 18, 1957 Lew drew and signed a check for $1,945 on Giant's account at Bankers and gave it to FNCB as the final payment for his loan. Although the trustee did not show that this distribution of assets impaired the capital of Giant, the courts below assumed that capital was impaired. In any event, this distribution did not cause insolvency of Giant.

Section 58 of the New York Stock Corporation Law expressly imposes liability on the directors of a corporation whose capital is impaired and the New York courts have also interpreted it to create liability on the part of transferees with knowledge of such impairment. Therefore the sole question as to FNCB is one of knowledge.

The only knowledge which FNCB received as to payment was that Lew was paying a debt with corporate funds. Inquiry by FNCB, if directed to either Bankers or Giant would have shown that Lew had authority to issue the check. Even if it be assumed that FNCB should have made further inquiry, it, nevertheless is entitled to the benefit of anything further inquiry would have disclosed. "Every fact that reasonable inquiry would have made known would have countenanced an honest belief that

the checks were issued without abuse of authority." *Reif v. Equitable Life Assurance Society*, 268 N. Y. 269 (1935).

Nothing in the circumstances put FNCB on inquiry to ascertain the amount of Giant's liabilities and capital and the value of its assets, and thus enable it to determine whether this payment impaired capital.

Petitioner has cited three cases* for the proposition that a trustee may recover from the payee a payment by an officer which reduces the corporation's capital, even where no insolvency resulted from such payment. This proposition of law has no application, however, to the facts of the present case. For each of the three actions was brought against a sole stockholder or against directors for dividends paid by them. The cases in no way support the proposition that corporate payments may be recovered from an innocent transferee who had no knowledge of the impairment of capital.

The case of *Grace v. Corn Exchange Bank*, 287 N. Y. 94 (1941), makes it plain that a bank's liability can only be predicated upon participation in a wrongful conversion. The Court said:

> "To establish joint liability of the bank for the dereliction of the trustee, the plaintiff must prove that the bank gave to the wrongdoer such assistance as would make the bank a participant in the wrong. Proof that the bank failed in care is insufficient."

The payment to FNCB was fully authorized and ratified by Giant and its sole stockholder; there was no participation by FNCB in any "wrong"; FNCB had no knowledge of any impairment of capital; and Giant was solvent at

---

* *Cottrell v. Albany Card & Paper Mfg. Co.*, 142 App. Div. 118 (3d Dept. 1911); *Irving Trust Co. v. Gaudet*, 234 App. Div. 252 (1st Dept. 1932); and *Cowin v. Jonas, et al.*, 293 N. Y. 838 (1944).

the time of the payment. The Court of Appeals decision in denying recovery to the trustee is completely in accord with applicable state law.

Conclusion.

The decision below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

New York, N. Y., April 4, 1962

Respectfully submitted,

JOHN A. WILSON
J. ROBERT LUNNEY
Attorneys for Respondent
First National City Bank
20 Exchange Place
New York 5, New York

SHEARMAN & STERLING
Solicitors for Respondents